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Public Prosecutor v Kong Chiong Jhong

HIGH COURT (SIBU) — CRIMINAL TRIAL NO SBW-45–06/6 OF 2012
SUPANG LIAN J
30 APRIL 2013

Criminal Law — Murder — Slashed with parang causing death — Accused charged under s 302 of the Penal Code — Prosecution's case relied on testimony of eyewitnesses — Whether evidence by eyewitnesses credible — Whether prima facie case proven — Whether accused should be called to enter defence

Evidence — Witness — Credibility of — Eyewitnesses allegedly saw accused slashing deceased and then fled scene — Whether distance between where eyewitnesses were standing and where the murder was committed made it probable for eyewitnesses to see murder clearly

The accused was charged with the murder of a woman ('Helen'), an offence under s 302 of the Penal Code. The prosecution relied on the testimony of the eyewitness, PW2 who testified that on the said night, she was staying at the Emas Hotel with four others. PW3, another eyewitness, had came to PW2's room and told her that the accused came looking for Helen in an angry manner. PW3 told her that Anong brought with him a *parang* and left after he could not find Helen. After PW2 heard this, she came out from her room and when she was about to close the door, she heard someone shouting for help. She looked out from the bathroom window and saw the accused slashing Helen on the face, head and shoulder with a *parang* and then fled the scene on his motorcycle. According to PW2, there were three windows in the bathroom from where she could see the incident. The distance between the bathroom window of and the place where Helen was slashed was about 22 feet or 7 meter. That was corroborated by testimony of the pathologist ('PW1') who testified that the cause of Helen's death was due to intracranial haemorrhage with fracture of the skull due to a sharp object.

Held, discharging and acquitting the accused without calling accused to enter defence:

(1) Given the distance of about 44 feet coupled with the fact that PW2 was looking down from the third floor of a building through a bathroom window, her view must have been severely restricted. Although PW2 claimed that she saw the assailant running to his motorcycle after the slaying through the bathroom window, under cross-examination she was unable to say where the motorcycle was parked. This goes to show that

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A the circumstances were such that it was difficult for her to witness the incident including the location of the motorcycle (see para 11).

(2) PW2 agreed under cross-examination that the assailant that she had seen was wearing a helmet at the time of the assault and he ran forward directly to his motorcycle without looking anywhere or without raising his head. This would mean that she was afforded no opportunity to see his face. It was inherently improbable for her to have seen the face of the assailant as he was wearing a helmet and running forward directly to his motorcycle without raising his head. The identification evidence of PW2 being poor, it was of no assistance at all to the prosecution's case (see paras 11 & 17).

(3) The inconsistencies in PW3's evidence and the material discrepancies with the evidence of PW2 exposed the inherent improbability of the story line of PW3. This cast serious doubts that he had the opportunity to see the assailant at the scene of crime let alone see the assailant running away from Helen's body to his motorcycle. He did not see the attack. Neither did he see any assailant at that point in time (see para 28).

(4) The quality of the identifying evidence of PW2 and PW3 was poor. There was no such credible supportive evidence available. The murder weapon was never recovered; none of the forensics exhibits collected for analysis yielded anything of significance and the identification parade evidence was of no value. The identification evidence being poor and there being no other evidence capable of supporting the identification evidence, the prosecution had fallen short of proving that it was the accused that had caused the injuries sustained by the deceased or that they were inflicted in consequence of the act of the accused (see paras 41–42).

[Bahasa Malaysia summary

Tertuduh telah didakwa dengan pembunuhan seorang wanita (Helen), kesalahan di bawah s 302 Kanun Keseksaan. Pendakwaan bergantung kepada testimoni saksi, PW2 yang memberi keterangan bahawa pada malam kejadian, dia bermalam di Hotel Emas dengan empat orang yang lain. PW3 seorang lagi saksi, telah datang ke bilik PW2 dan memberitahu bahawa tertuduh datang mencari Helen dalam keadaan marah. PW3 memberitahu Anong membawa parang bersamanya dan pergi setelah dia tidak dapat menjumpai Helen. Selepas PW2 mendengar perkara ini, dia telah keluar dari biliknya dan apabila dia hendak menutup pintu, dia mendengar seseorang menjerit meminta pertolongan. Dia melihat keluar dari tingkap bilik mandi dan melihat tertuduh mengelar Helen di muka, kepala dan bahu dengan parang dan kemudian lari dari tempat kejadian menaiki motosikal. Menurut PW2, terdapat tiga tingkap di dalam bilik mandi dan tempat di mana Helen dikelar adalah lebih kurang 22 kaki atau 7 meter. Perkara itu telah disokong oleh testimoni ahli patologi ('PW1') yang memberi keterangan bahawa penyebab kematian Helen adalah

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disebabkan oleh hemoraj intrakranium dengan keretakan tengkorak disebabkan oleh objek tajam.

Diputuskan, melepaskan dan membebaskan tertuduh tanpa memanggil tertuduh untuk memasukkan pembelaan:

(1) Memandangkan jarak kira-kira 44 kaki ditambah pula dengan fakta bahawa PW2 melihat ke bawah dari tingkat ketiga bangunan dari tingkap bilik mandi, pandangannya mestilah sangat terhad. Walaupun PW2 mendakwa bahawa penyerang berlari ke motosikalnya selepas mengelar melalui tingkap bilik mandi, sewaktu pemeriksaan balas dia tidak dapat menyatakan di mana motosikal tersebut diletakkan. Ini menunjukkan bahawa dalam hal keadaan sedemikian ia adalah sukar untuk dia menyaksikan kejadian itu termasuk lokasi motosikal tersebut (lihat perenggan 11).

(2) PW2 bersetuju sewaktu pemeriksaan balas bahawa penyerang yang dia lihat memakai helmet sewaktu masa serangan dan dia telah berlari terus ke motosikalnya tanpa melihat ke mana-mana atau tanpa mengangkat kepalanya. Itu bermakna dia tidak mendapat peluang untuk melihat muka penyerang. Ia adalah sangat mustahil baginya untuk melihat muka penyerang memandangkan dia memakai helmet dan berlari terus ke motosikalnya tanpa mengangkat kepala. Keterangan pengecaman PW2 adalah lemah, dan tidak langsung membantu kes pendakwaan (lihat perenggan 11 & 17).

(3) Ketidakkonsistenan dalam keterangan PW3 dan percanggahan material dengan keterangan PW2 mendedahkan kemustahilan jalan cerita PW3. Ini menimbulkan keraguan yang serius bahawa dia mempunyai peluang untuk melihat penyerang itu di tempat kejadian jenayah apatah lagi melihat penyerang itu melarikan diri dari tubuh Helen ke motosikalnya. Dia tidak nampak serangan tersebut. Dia juga tidak melihat mana-mana penyerang pada waktu itu (lihat perenggan 28).

(4) Kualiti keterangan pengecaman oleh PW2 dan PW3 adalah lemah. Tiada apa-apa keterangan sokongan yang kredibel yang sedia ada. Senjata pembunuhan tidak pernah dijumpai; tiada ekshibit forensik yang dikumpulkan untuk analisis menghasilkan apa-apa kepentingan dan keterangan barisan pengecaman adalah tidak bernilai. Keterangan pengecaman adalah lemah dan tiada keterangan lain yang mampu untuk menyokong keterangan pengecaman, pendakwaan gagal untuk membuktikan bahawa ia adalah tertuduh yang menyebabkan kecederaan dialami oleh si mati atau telah disebabkan akibat daripada tindakan tertuduh (lihat perenggan 41–42).]

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Notes

For a case on slashed with parang causing death, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1537.

For cases on credibility of, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3152–3206.

Cases referred to

Heng Aik Ren Thomas v PP [1988] 3 SLR 465, CA (refd)

Jadunath Singh & Anor v State of UP AIR 1971 SC 363, SC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (folld)

PP v Sarjeet Singh & Anor [1994] 2 MLJ 290, HC (refd)

PP v Tan Sri Kasitah Gaddam [2009] 6 MLJ 494, HC (refd)

R v Turnbull and others [1976] 3 All ER 549, CA (consd)

Tarn Kim Hoo v PP & Anor appeal [2007] 6 CLJ 557, CA (refd)

Legislation referred to

Criminal Procedure Code s 180

Evidence Act 1950 s 114(g)

Penal Code ss 300(a), (b), (c), (d), 302

Musli bin Ab Hamid (Deputy Public Prosecutor) for the prosecution.
David HP Kuok for the accused.

Supang Lian J:

INTRODUCTION

[1] The accused Kong Chiong Jhong was charged with the murder of a woman, Helen ak Tima on 9 August 2009 at about 11am at the lane at the back of Hotel Emas, Jalan Tiong Hua in Sibu. This is an offence punishable under s 302 of the Penal Code. The prosecution called 11 witnesses to prove the guilt of the accused. At the conclusion of the case for the prosecution I discharged and acquitted the accused as I found and ruled that the prosecution had not made out a prima facie case against him on the offence charged.

STANDARD OF PROOF

[2] At the close of the case for the prosecution, the court was to determine whether the prosecution had established a prima facie case in accordance with s 180 of the Criminal Procedure Code . In *Public Prosecutor v Tan Sri Kasitah Gaddam* [2009] 6 MLJ 494 at p 508 Suraya Othman J, after considering the relevant authorities, came up with what I think is a succinct statement of what constitutes a prima facie case as follows:

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A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of every prosecution witnesses must be done at the close of the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.
a maximum evaluation of the prosecution's case does not mean that the prosecution must prove its case beyond a reasonable doubt at that stage. What it means is that the prosecution must prove each and every essential ingredients of the offence by credible and reliable evidence which has been filtered and sieved through the positive process of evaluation. There should not be any material gaps in the evidence and if the evidence admits of two or more inferences then the inference that is most favourable to the accused shall be drawn.

In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 at p 400; [2006] 1 CLJ 457 at p 467 the Federal Court gave guidelines on the steps to be taken when the case for the prosecution has concluded. They are:

(a) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused; and

(b) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted.

[3] Applying the above principles to the present case, the test therefore would be: Was the evidence sufficient to convict the accused if he had elected to remain silent? If the answer was in the affirmative, then a prima facie case had been made out. The converse would lead to an acquittal.

INGREDIENTS OF THE OFFENCE

[4] Murder is an aggravated form of culpable homicide and s 300(a), (b), (c) and (d) of the Penal Code sets out the four conditions when culpable homicide turns into murder. The prosecution did not indicate under which limb they relied but in the context of the charge preferred, the evidence adduced and the

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submissions of the learned deputy public prosecutor and learned defence counsel, in my view it was incumbent on the prosecution to prove the following ingredients:

(a) the death of Helen ak Tima;

(b) such death was caused by, or in consequence of the act of the accused; and

(c) such act was done by the accused either:

(i) with the intention of causing death; or

(ii) with the intention of causing such bodily injury as:

()the accused knew to be likely to cause death; or

()was sufficient in the ordinary course of nature to cause death.

(See *Mallal's Penal Law*, XVI [302.3] at p 501)

DEATH OF HELEN AK TIMA

[5] This was sufficiently proved through the evidence of the pathologist Dr Jamil bin Abdul Kadir ('PW1') and corroborated by his post mortem report exh P3. PW1 gave evidence that he did the post mortem of the dead body of Helen on 14 August 2009 at about 8.30am whereby the body was identified by one Geling ak Abit. PW1 said that the cause of death was due to intracranial haemorrhage with fracture of the skull due to a sharp object. Geling ak Abit ('PW4') confirmed being present at the post mortem on 14 August 2009 and identifying the dead body as that of Helen ak Tima who was his step daughter.

THE NATURE OF THE BODILY INJURIES AND CAUSE OF DEATH

[6] PW1 testified of this. The injuries he found on the body of the deceased are as listed in his post mortem report P3 namely:

(a) cut wound at the vertex 11cm long, 1.5cm wide cutting the skull bone and dura of the brain;

(b) deep cut wound at face extending from left zygomatic area to right mouth, cutting upper nasal bone and upper jaw 18cm long, 8cm deep and gaping;

(c) superficial cut wound at left eye 6cm long and gaping;

(d) cut wound at (R) shoulder exposing head of humerous 11cm long and 8cm wide; and

(e) bruises at (L) elbow, medial (L) foot.

PW1 said that only injury No 1 was fatal and it was sufficient in the ordinary

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course of nature to cause the death of the deceased. PW1 found that death was caused by intracranial haemorrhage from the fracture of the skull due to the cut wound at the centre of the head ie injury No 1. PW1 was also of the opinion that injuries No 1 and 2 were caused by a sharp object as for example a *parang*. Based on the measurements of the injuries, he estimated the length of the sharp object to be at least 18cm or more. Thus, from the evidence adduced through PW1, I was satisfied that the prosecution had sufficiently proved that the deceased died due to the bodily injuries inflicted on her.

WHETHER THE INJURIES SUSTAINED WERE CAUSED BY OR IN CONSEQUENCE OF THE ACT OF THE ACCUSED?

[7] The prosecution proffered evidence of this through the identification evidence of Magdeline ak Manja ('PW2') and Franky ak Jonathan Tarang ('PW3') supported in part by the evidence of ASP Tega Bilong ('PW11'), the investigating officer of the case. PW2 and PW3 were made out as eye witnesses to the killing of the deceased and the case of the prosecution depended wholly or substantially on the correctness of their identification of the accused as the assailant. The defence however alleged that the identification evidence was mistaken. As indicated when delivering judgment at the end of the trial, I found the identification evidence of PW2 and PW3 to be of poor quality, unreliable and highly doubtful. In addition, PW2 and PW3 gave evidence fraught with discrepancies on material particulars and at times so divergent that they negated each other's evidence. I will elaborate.

[8] In evaluating identification evidence, one must look to the guidelines enunciated in *R v Turnbull and others* [1976] 3 All ER 549 which have been summarised in Adrian Kean's *The Modern Law of Evidence*, (2nd Ed), Butterworths 1989 at pp 157–158 as follows:

(a) whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on such evidence. He should give the reason for the warning and refer to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. If this is done in clear terms, no particular form of words is required;

(b) the judge should direct the jury to examine closely the circumstances of identification by each witness. These circumstances include the length of observation, the distance from which the observation was made, whether the observation was impeded in any way, whether the witness had seen the accused before, and if so, how often, whether the witness had any special reason for remembering the accused, the length of time between the original observation and subsequent identification to the police, and

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material discrepancies between the description first given to the police and the accused's actual appearance. In relation to the last of these circumstances, if the prosecution have reason to believe such discrepancies exist, they should supply the defence with particulars of the description first given and, in all cases, if the accused seeks particulars of such descriptions, the prosecution should supply them. The judge should remind the jury of any specific weaknesses in the identification evidence;

(c) where the witness purports to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made;

(d) if the quality of the identifying evidence is good, the jury can be left to assess its value even where it is not supported by other evidence: provided always that an adequate warning has been given about the special need for caution;

(e) when, in the judgment of the judge, the quality of the identifying evidence is poor, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support its correctness. This may be corroboration in the traditional sense but need not be so if its effect is to make the jury sure that there has been no mistaken identification;

(f) the judge should identify to the jury evidence capable of supporting the identification evidence, indicating any evidence which the jury might think to be supportive but which, in fact, is not; and

(g) the judge should take care when directing the jury about supportive evidence derived from the fact that they have rejected an alibi. It is only when the jury is satisfied that the sole reason for the fabrication is to deceive them, and that there is no other explanation for its being put forward (for example to support the accused's own truthful evidence which he fears is not enough), that fabrication can provide support for the identification evidence. The jury should be told that evidence that the accused has told lies about where he was at the material time does not, by itself, prove that he was where the identifying witness says he was.

With those guidelines in mind, I turn now to appraising the identification evidence adduced by the prosecution.

The evidence of PW2

[9] PW2 gave evidence-in-chief mainly in Question & Answer manner instead of being asked to narrate her story. She testified that on 9 August 2009 she was staying at the Emas Hotel at Foochow Lane, Sibu in room No 406 with her boyfriend Kuoh Koo Woo also known as 'Holo'. Other than the two of

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them, three other friends namely Franky (PW3), Helen (the deceased), and Ak Kiong were staying at the same hotel together in Room 401. She claimed that she and PW3 are the adopted children of Helen. At about 10.30–11am, PW3 came to her in Room 406 and told her that one Anong, came to Room 401 looking for Helen in an angry manner. PW3 told her that Anong brought with him a parang and left after he could not find Helen in Room 401. PW2 had known Anong for two months prior to 9 August 2009 and that was through Helen whom she claimed to be friends with Anong. After PW2 heard what was told her by PW3, she came out from her room and when she was about to close the door, she heard someone shouting for help. She went to Room 401, looked out from the bathroom window and saw Anong slashing Helen on the face, head and shoulder with a *parang* which was about 2 1/2 feet long at the back of the hotel. Immediately after the slashing she saw Helen fell down whilst Anong had run away to his motorcycle. When Anong ran away he carried with him the *parang* which was covered with blood. She said that there were three windows in the bathroom of Room 401 from where she could see the incident. She said that the distance between the bathroom window of Room 401 and the place where Helen was slashed was about 22 feet or 7 meters. She claimed that after she witnessed the incident, she went downstairs using the only staircase and found Helen lying face up at the back of the hotel. She then called the police. She identified the accused in the dock as Anong.

[10] Under cross-examination, PW2 agreed that Helen was a prostitute and a drug pusher and had offended a lot of people. According to her, Helen used Hotel Emas especially Room 401 frequently for prostitution. It was therefore put to PW2 as the defence case that the accused visited Room 401 that day to look for a prostitute. She denied that her boyfriend Holo was in Room 401 when the accused came to that room. This was against the evidence of PW3 who testified that Holo was in Room 401 and had answered the door when the accused visited.

[11] It was also put to PW2, although she disagreed, that there was no window but only a small glass panel in the bathroom of Room 401 that one had to climb on a chair to look out through the glass panel and thus it was not possible to see the place where Helen was lying through the glass panel. Nevertheless, she agreed that Emas Hotel was in a five storey building and Room 401 was on the third floor ie the fourth storey of the building. As such, she conceded that the distance between Room 401 and the ground below would have doubled the distance of 22 feet as she had described in evidence-in-chief. To my mind, given the distance of about 44 feet coupled with the fact that PW2 was looking down from the third floor of a building through a bathroom window, her view must have been severely restricted. Furthermore, although PW2 claimed that she saw the assailant running to his motorcycle after the slaying through the bathroom window, under

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cross-examination she was unable to say where the motorcycle was parked. This goes to show that the circumstances were such that it was difficult for her to witness the incident including the location of the motorcycle. Worse still, PW2 agreed under cross-examination that the assailant that she had seen was wearing a helmet at the time of the assault and he ran forward directly to his motorcycle without looking anywhere, that is to say, without raising his head. This would mean that she was afforded no opportunity to see his face. I reproduce the relevant parts of the cross-examination below:

> Q 179: The assailant was wearing a helmet when he ran towards his alleged motorcycle, do you agree?
>
> A: I agree.
>
> Q 180: He just run forward directly to his motorcycle without looking anywhere, correct?
>
> A: I agree.

To my mind, as PW2 claimed that she witnessed the incident by looking down from the bathroom window of Room 401 which was on the third floor of the building, it was inherently improbable for her to have seen the face of the assailant as he was wearing a helmet and running forward directly to his motorcycle without raising his head.

[12] The incredulity of the identification evidence of PW2 was amplified the more during re-examination where she had reiterated her evidence that Anong was wearing a helmet when he slashed Helen. But when asked to explain how she could identify the accused as the assailant if he had a helmet on, she came up with the baffling answer that she could recognise the way he walked when he took 'syabu'. The relevant excerpts of the re–examination are as follows:

> Q 194: If the accused was wearing helmet when he slashed Helen, how could you positively identify that the person who slashed Helen was the accused person?
>
> A : I can identify him from his body.
>
> Q 195: Which part of his body that you recognized it was the accused person?
>
> A : I can recognize the way he walked when he took 'syabu'

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Q 196: When the accused slashed Helen, you saw the front part or the back part of the accused?

A : I saw the front part of the accused body.

Q 197: Apart from you know from the way accused walk when he took syabu, how did you exactly know that it was the accused?

A : I only confirm the way he walked when he took syabu. (Emphasis added.)

Thus, there was no mistaking the evidence of PW2 that the only way she had recognised the assailant as the accused was 'from the way he walked when he took syabu'.

Evaluation of the identification evidence of PW2

[13] Three important points flowed from the evidence of PW2. Firstly, she had confirmed in no uncertain terms that she never saw the face of the assailant. Notwithstanding the unambiguous evidence of PW2, the learned deputy had submitted that PW2 could see the face of the accused at the time of the slashing. In support of his argument, the learned deputy referred to the evidence of Insp Dayang Tantysera ('PW8') who on 23 May 2011 held an ID parade where PW2 was asked to identify a suspect involved in the case. According to PW8, PW2 told her that she had managed to identify the accused based on his face. The learned deputy argued that if PW2 did not see the face of the accused at the time of the slashing, she would not have been able to identify the accused at the ID parade based on his face. In my judgment, the reasoning is flawed for obvious reasons. As we have seen, it is the evidence of PW2 that the accused was a person known to her before the slaying of Helen. In light of her admission in court that she knew the accused even before the incident, a fact that she never disclosed to PW8 either before or after the ID parade, in my view, her identification of the accused at the ID parade based on his face was of little value. In any case, it certainly did not detract from PW2's definite evidence that she did not see the face of the assailant at the time of the slaying of Helen. In the circumstances, I found the argument of the learned deputy on this untenable.

[14] Secondly, it is noteworthy that PW2 had stated that she had only seen the front part of the body of the accused as he slashed Helen and then saw him running to his motorcycle. Thus, from her own evidence, she never saw the assailant walking. Since she never saw the assailant walking, to my mind, her evidence that she had recognised the accused from the way he walked when he took syabu was rendered meaningless.

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[15] Thirdly, at the trial there was no evidence that the accused had taken syabu and PW2 did not describe the way the accused 'walked when he took *syabu*', whatever it means, so as to enable her to positively identify him as the assailant. Furthermore, before the trial, PW2 did not give any description to the police concerning the identification of the accused as the assailant through the way he walked. PW8 testified PW2 did not request for the participants of the ID parade to walk so as to enable her to identify the suspect through the way he walked. Thus, in my judgment, the identification of the accused as the assailant by the way he 'walked when he took syabu' was devoid of meaning and rendered the purported recognition valueless. It appeared to me to be an afterthought plucked from thin air when PW2 realised whilst under cross-examination that her identification of the accused as the person that she had seen slashing Helen was inherently improbable in view that she could not have seen his face.

[16] More need to be said with regard the ID parade identification evidence. As already mentioned, PW2 claimed in court that she had known the accused for two months prior to 9 August 2009 as he was Helen's friend. If PW2 had seen the accused as the assailant and had informed the police as she had claimed in court, it did not stand to reason that the police should have required her to attend the ID parade given that the accused was previously known to her. It has been said before that the identification of an accused who was in fact a person known to the witness is of no value and a waste of time. Abdul Malik Ishak JC (as he then was) said as much in *Public Prosecutor v Sarjeet Singh & Anor* [1994] 2 MLJ 290, at pp 294–295:

> In my judgment, the necessity of holding an identification parade can only arise where the accused persons are not previously known to the witnesses (see *Methab Singh & Ors v State of Madya Pradesh* AIR 1975 SC 274). It follows, therefore, that where the accused persons are already known to the witnesses, the question of identification parade does not arise.

In *Jadunath Singh & Anor v State of UP* AIR 1971 SC 363, at p 368 Sikri J said:

> It seems to us that it has been clearly laid down by this court in Criminal Appeal No 92 of 1956, D/15-1-1957 (SC) that the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be a waste of time to put him up for identification.

Sarkar's *Law of Evidence*, Vol 1, (15th Ed), 1999 at pp 214–215 puts it in stronger terms this way:

> Identification parade belongs to investigation stage [*Hasib v S, A* 1972 SC 283]. Police is not required to hold an identification parade where a suspect had previously been properly and adequately identified by a complainant simply because the suspect continued to dispute the identification [*R v Popat*, The Times, April 10, 1998 (CA)]. If the accused is known to the identifying witnesses there is no need to hold parade [*Mehtab v S, A* 1975 SC 274, *Bijoy Kumar Mohapatra v The State,* 1982 Cri LJ 2162, 2174 (Ori), *Sidhan v State of Kerala* (1986) Cri LJ 470, 472 (Ker), *Sairjit Singh v State,* 1986 Cri LJ 1910, 1912 (Del) (DB)] and the

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identification by them is a farce [*Chauhan v R, A* 1934 O 251: 148 IC 1192]. When names of the accused are mentioned in FIR an identification parade is not necessary [*Dharamvir v S, A* 1974 SC 1156].

Likewise, in our present case, the identification by PW2 of the accused at the ID parade as the suspect was a farce because the accused was known to her. Hence, no weight could be attached to the ID parade evidence.

[17] For the reasons stated above, I found that the circumstances in which the identification by PW2 of the accused as the assailant was poor. I found that her evidence that the assailant was wearing a helmet without raising his head would not have afforded her any opportunity to see his face. And precisely so, for PW2 had never testified that she saw the face of the assailant at any time but had only recognised him as the accused by the way he walked. As for the purported identification of the accused through the way he walked when he took *syabu*, for the reasons stated above, it is unreliable and of no value. The identification evidence of PW2 being poor, it was of no assistance at all to the prosecution's case.

The evidence of PW3

[18] I turn now to the evidence of PW3. As I have said before, his evidence was fraught with discrepancies and to a large extent at variance with the evidence of PW2 in material aspects. In evidence-in-chief he said that he was washing clothes in Room 401 on 9 August 2009 at about 10.30am when he heard someone kicking the door. He spoke of having opened the door of the room himself and seeing the accused, someone known to him, at the door. The accused was asking for Helen in an angry manner and brought a *parang* about 2 feet long the blade of which was wrapped in a piece of cloth. He told the accused he did not know where Helen was and the accused had then gone downstairs. After the accused left, he went to Room 406 and told PW2 that 'someone' was looking for Helen. After that he returned to Room 401. When he was back in Room 401, he heard someone shouting. He looked out from the bathroom window and saw Helen lying on the ground. He did not say that he saw the attack on Helen or that he saw the assailant when he looked out through the window. He also claimed that at the time he heard someone shouting PW2 was with him and she looked out from the bathroom window first before he did.

[19] The first of the contradictions between the evidence of PW2 and PW3 is this. PW2 had testified that when PW3 came to see her in Room 406, it was to tell her that Anong had come looking for Helen in an angry manner and was carrying a *parang*. Thus, PW3's evidence that he had merely told PW2 that someone came to look for Helen was against her evidence. Also, contrary to PW2's evidence, PW3 said that PW2 had looked worried when he spoke to her

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in Room 406 and she came over to Room 401. It was only in Room 401 that he told her that it was Anong that had come to look for Helen. Another obvious contradiction is that PW3 claimed that PW2 was with him in Room 401 when he heard someone shouting whereas PW2 had testified that she was outside the door of Room 406 just about to close it behind her when she heard someone shouting for help. She said it was only after she heard the shout that she had gone to Room 401 and looked out from the bathroom window. There are more contradictions to come.

[20] PW3 testified that after seeing Helen lying on the ground he went downstairs and to the back of the hotel where Helen was. When he reached Helen, he saw someone running away from her to a motorcycle. He said the motorcycle was parked at the back of the hotel quite far away from the scene. This person running away from Helen was wearing something on his head but he was not sure whether it was a helmet or a cap. However, this person whilst running had turned his head back and he saw his face which he recognised. He identified the accused as the person that he had seen running away from Helen. He claimed that the distance between him and the accused when he turned his head was 24 feet. After that he turned to look at Helen, saw the injuries and asked PW2 to call the police. He also claimed that when the accused ran away from Helen he was carrying a *parang* and the blade was covered with blood. He said that PW2 got to Helen before he did and other than seeing the accused, he did not see anyone else running away from Helen. He said that the police arrived after PW2 made the phone call. Before the police arrived, he and PW2 did not leave the body of Helen unattended.

[21] In contradiction with the evidence of PW2, PW3 said that he is not an adopted son of Helen. He said that the accused was also known to him as 'Ikan' as he has heard Helen calling him by that name before. He agreed that he made the police report marked P9 in relation to the incident and claimed that at the time he made the report he knew that the assailant was Anong. Yet in his report he stated that when the hotel door was opened a 'lelaki yang saya tidak kenali telah masuk dengan membawa sebilah parang'. Therefore, in his police report he stated that the man who came to Room 401 was a person unknown to him. When asked why he said so in his report, he claimed he was nervous at the time he lodged the report. As well, PW3 in P9 had stated, 'Kemudian seorang perempuan yang berada di situ menghubungi pihak polis untuk bantuan'. In court he said the lady he meant in P9 was Magdeline (PW2) but he did not reveal her name in P9 because he was nervous when he lodged the report. It is noteworthy that PW3 did not mention in his report that the unknown man had come in an angry manner or that he had seen the assailant fleeing from the scene and he had recognised him as the accused.

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[22] The cross-examination of PW3 brought out more contradictions. He disclosed he was in the bathroom of Room 401 when the accused came and admitted he did not see the accused kicking the room door as it was closed at that time. When pressed further, he said that it was the police that had mentioned to him there was a shoe mark on the door which he had then seen. PW11, the investigating officer, on the other hand testified that it was 'a witness', presumably PW3 that had told the police of the door having been kicked by the suspect. PW11 instructed for the photograph (ie P8(4)) of the door of Room 401 to be taken as the witness had told the police that the suspect had kicked hard at the door. What he intended to show in P8(4) is a scratch mark that he found on the door consisting of a dark line at the left side. However, he had no idea how the scratch mark came to be there and could not tell whether it was from wear and tear. When re-examined on this PW3 came up with a new twist to the story saying that he could tell from the sound at the door that the accused was kicking the door. This piece of evidence was of no value at all because it appeared to be an afterthought as it surfaced for the first time during re-examination. In any case he did not describe the sound that he heard that led him to deduce that the accused had kicked hard at the door. In my view, it has been amply demonstrated by the foregoing that PW3's evidence that the accused had kicked hard at the door of Room 401 in anger was without basis and doubtful.

[23] In yet another direct contradiction with his evidence-in-chief, PW3 disclosed that when the accused came to Room 401, Kuoh Koh Woo (Holo) was in the room at that time. He said also that it was Holo and not him that had opened the door for the accused. Apparently he was still in the bathroom washing clothes when the accused came and he had opened the bathroom door and asked Holo to answer the room door. This new twist in his evidence was also against the evidence of PW2 who was quite adamant that Holo was in Room 406 when the accused visited Room 401. PW3 went on to admit that after Holo had opened the door of Room 401, the latter stood at the side of the door and spoke to the accused in Foochow dialect. He admitted that after the accused left he continued washing the clothes, meaning to say, he never went out of the bathroom when the accused came and spoke to Holo. PW3 then went on to admit that as an Iban he did not understand the conversation between Holo and the accused. When it was put to him that Holo had told him that the accused came to look for a prostitute, he claimed that Holo did not tell him anything about the conversation and did not tell him the purpose of the accused's visit. Although he did not know the purpose of the visit, he maintained that the accused was angry as shown by his act of kicking and knocking hard at the door and asking for Helen in a rough manner. When it was put to him that the accused was merely talking out loud as he was quite a rude person and looked fierce when he did not smile, he said he did not know. In re-examination he said that although the accused had spoken to Holo in

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Foochow dialect, he knew the accused was looking for Helen because before Holo opened the door the accused had called out in Iban language 'Ni Jalut', 'Jalut' being Helen's nickname.

[24] It is noteworthy that Holo was never called to testify although PW11 admitted that he was present in the court premises on 22–24 Otcober 2012 during the trial. In my view, Holo would have been the best person to testify on the purpose of the visit of the accused to Room 401 as the accused spoke to him and not PW3. Moreover, as it was Holo that had spoken to the accused, he also would have been the best person to testify on whether the accused was angry with Helen and if so, what he was angry about. I agreed with the submission of the defence that Holo's evidence was necessary to unfold the truth of the purpose of the accused's visit to Room 401 and whether or not the accused was angry and if so, the reason for it. In my judgment it was appropriate to draw the adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution for not calling Holo to testify. The inference is that had Holo been called as a witness, his evidence would not have been in favour of the prosecution for he would have testified that the accused was merely looking for a prostitute, did not kick the door and was not angry with Helen. Thus, the case for the prosecution that the accused was angry with Helen when he came to Room 401 was doubtful and not made out.

[25] PW3 also disclosed during cross-examination that he had merely assumed that the accused was holding a *parang* when he came to Room 401. He said that he did not actually see what was being held by the accused as it was wrapped in a piece of cloth and what he thought to be the handle of the *parang* was completely covered by the accused's hand. The relevant cross-examination is as follows:

> Q 293: The alleged parang was wrapped up completely, do you agree?
>
> A : I only saw the blade part and it was wrapped.
>
> Q 294: You confirm that you only saw the blade part which was wrapped, correct?
>
> A : Yes.
>
> Q 295: You did not see the handle, correct?
>
> A : Yes, as it was covered by his hand.
>
> Q 296: Can you demonstrate how the accused covered the handle with his hand?
>
> A : (Witness demonstrates with grasping action with left hand). He held the handle of the parang so.
>
> Q 297: You are not sure which hand the accused held the parang?

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A : Yes.

Q 298: In other words, what you had allegedly seen is that the accused was holding something which was covered with a piece of cloth?

A : Yes.

Q 299: Of course you cannot see what was covered by the cloth, correct?

A : I assumed that was parang.

Q 300: You are not certain as to what was allegedly held by the accused on 9.8.2009 when he came to room 401?

A : I assumed that was parang.

The re-examination of PW3 did not throw further light on the matter for he merely said that he assumed that the object that the accused held was a *parang* because it looked like a *parang*.

[26] In light of PW3's admission that he was merely assuming that the object carried by the accused was a *parang*, there simply was no evidence that the object carried by the accused was a *parang*. Since the object was all wrapped up or covered, there was no telling what it could be. It could be anything but a parang and PW3 had made a wild guess that it was a *parang*. To my mind, the best person to testify on what was the object that the accused held when he was at Room 401 would have been Holo. This is because he spoke to the accused and stood in close proximity with him face to face at the door of Room 401 and would have seen whatever the accused had in his hand. This was yet another reason for me to draw the adverse inference under s 114(g) against the prosecution for not calling Holo as a witness. The inference is that if called as a witness, Holo would have testified that the object carried by the accused was not a *parang*. In the result, I found that the prosecution had not established that the accused was carrying a *parang* as PW3 had alleged when he came looking for Helen at Room 401.

[27] In yet another marked departure from his evidence-in-chief, PW3 revealed under cross-examination that before he went to PW2's room and whilst he was still in Room 401 he had heard the scream of a female voice. It was after hearing this first scream that he had gone over to PW2's room to inform her about it and at the same time to ask her to check downstairs. This new piece of evidence from PW3 was also at complete variance with the evidence of PW2. PW2 never testified of PW3 having informed her of hearing the first scream of the female voice or of being asked to go downstairs to check. PW3 continued by saying that after he had informed PW2 of the first scream, he again heard the scream of the same female voice and it was after hearing the scream of the female voice a second time that PW2 had looked out through the bathroom window. PW3 could not tell how long the interval was between the first and the second screams. After he and PW2 had looked out through the

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bathroom window upon hearing the scream of the female voice a second time, he asked PW2 to go downstairs and he followed a few minutes later. In re-examination the learned deputy made him clarify that he went downstairs not long after PW2 which, in my view, was no different from saying that he had followed downstairs a few minutes later. PW3 testified further under cross-examination that when he reached Helen's body, the only other person there was Magdeline. He claimed to have seen the accused running fast to his motorcycle which he said was parked about 65 feet away from where Helen was and claimed to have actually seen the accused riding away on the motorcycle.

Evaluation of the identification evidence of PW3

[28] The first point I wish to make is that the inconsistencies in PW3's evidence and the material discrepancies with the evidence of PW2 exposed the inherent improbability of the story line of PW3 thereby casting serious doubt that he had the opportunity to see the assailant at the scene of crime let alone seeing the assailant running away from Helen's body to his motorcycle. In this regard, it is common ground between PW2 and PW3 that PW2 was the first to look out the bathroom window after they heard a woman shouted for help and that PW3 had only looked out the window after PW2. According to PW2 when she looked out she saw the assailant slashing Helen on the face, head and the shoulder and then saw him running away to his motorcycle. Going by her account, by the time PW3 had a look from the same window, the assailant would have been gone from the spot where Helen was. Indeed, going by the evidence of PW3 concerning what he saw when he looked out the window, that appeared to have been the case for all that he saw was Helen lying on the ground. He did not see the attack. Neither did he see any assailant at that point in time. Thus, up to this point, the evidence of PW3 tied in with the evidence of PW2 when she said that she had earlier seen the assailant running away to his motorcycle.

[29] Now, after looking out the window, PW2 did not immediately go downstairs. This is so because PW3 testified that it was only after he and PW2 had looked out the window that he had asked PW2 to go downstairs and he followed a few minutes later. I would at this juncture point out that logically speaking, the assailant that PW2 had seen fleeing (when she looked out the window earlier) from the place where Helen was, would in the mean time, have gained a lot of ground in his run towards his motorcycle. PW2 then went downstairs using the only staircase of the hotel. As Room 401 is on the third floor of the building, PW2 would have taken some time to get to the spot where Helen lay. And since PW3 had only gone downstairs a few minutes after PW3, he would have taken longer to get to the body of Helen. To point out the obvious, from the time PW3 looked out the window, gave instructions to PW2 to go downstairs, waited a few minutes and then went downstairs himself, the assailant that PW2 had earlier seen fleeing from the body of Helen would in the

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mean time have gained more ground in his run to his motorcycle. PW3 was to later say that the distance from the place where Helen's body lay to the motorcycle was 65 feet. If that is the case, common sense will tell us that the assailant who had already started running from the place where Helen lay as seen earlier by PW2 would have been long gone by the time either PW2 or PW3 had reached the place where Helen was at the back of the hotel. It was inherently incredible that the assailant was still lingering around the body of Helen from the time PW2 saw him slashing Helen from the bathroom window of Room 401 waiting somehow to be spotted by PW3 running away from the body. As ludicrous as it may sound, but that precisely was what PW3 would have the court believed. In my judgment, PW3's evidence of having seen the accused running away from the body of Helen to his motorcycle makes for a fanciful story and as such it was unworthy of belief. I rejected it.

[30] Furthermore, given the sequence of events described by PW2 and PW3 especially that it was PW2 that had come down earlier and reached Helen's body first, it was incredible that PW3 could have seen the assailant running away from Helen's body whereas PW2 did not speak of having seen the assailant when she reached Helen's body. On this matter, the learned deputy submitted that it was never in the evidence of PW2 that she did not see anyone running away from the deceased when she reached the deceased body. He alleged that learned defence counsel was creating evidence in so saying. He submitted that the defence should have cross-examined PW2 on the matter. With respect, the argument of the learned deputy in my view is fallacious as it overlooks PW2's earlier evidence of having seen the assailant from the bathroom window of Room 401 running away from Helen after attacking her. That was the crux of PW2's evidence – the time she saw the assailant running away from Helen's body was when she looked out the window and not when she reached the body of the deceased. Thus, in my view, it was not wrong for the defence to have submitted that PW2 did not see anyone running away from Helen's body when she reached the body. As for saying that the defence should have cross-examined PW2 on this matter, with respect this is misconceived. PW2 never spoke of seeing the assailant fleeing from the scene when she reached Helen's body and it was never the case for the defence that she had seen such a thing. Besides, PW2 testified before PW3. The defence could not be expected to foresee that PW3 would be giving contradictory and irreconcilable evidence with that of PW2. Thus, the question of the defence needing to cross-examine PW2 on this point did not arise at all. In light that PW2 had seen the assailant fleeing from the scene when she looked out the window earlier and not at the time when she actually reached the scene a few minutes before PW3; it made nonsense of PW3's story of having seen the assailant fleeing from the scene when he arrived. It fortified my belief that PW3's story of having seen the assailant running away from the body of Helen towards his motorcycle; then turning his head back thus enabling him to recognise him and riding away on his motorcycle was unworthy of belief and to be rejected.

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[31] The second point is this. Evidence elicited from PW11 strongly suggested that PW3 (and PW2) had come to the scene after the police had arrived which meant that PW3's evidence that he had seen the assailant running away from the scene was highly suspect. PW11 testified that he and his team of police personnel arrived at the scene at about 12pm on 9 August 2009. In sharp contradiction with the evidence of PW2 and PW3, he said that when the police first arrived at the scene, there was no one with the body of Helen and nobody nearby. His first action at the scene was to instruct his men to guard the scene, followed by doing the markings and taking photographs. After conducting initial investigations and drawing the sketch plan, he instructed his men to send Helen's body to the hospital. It was after he had instructed for the body to be sent to hospital that he managed to find two witnesses namely PW2 and PW3 at the crime scene. PW2 and PW3 had then brought him to Hotel Emas and showed to him Room 401 where photographs including P8(4) were taken. After that he asked PW3 to lodge a police report and that was how P9 came about. As can be seen from P9 the time of making the report was 12.24pm. PW11's evidence that there was no one with the deceased and nobody nearby when he and his men arrived at the scene negated PW3's (and PW2 as well) claim that he and PW2 had gone to the scene before the arrival of the police as they had described.

[32] The learned deputy argued that the reason PW11 did not see PW2 and PW3 nearby at the scene when he arrived was the area was already cordoned by the police prior to his arrival. For this the learned deputy relied on the evidence of PW5 (Jonis ak Geling) who according to the learned deputy had testified that he had arrived at the scene at about 11am. When he arrived, the area was cordoned off and he could not go closer to Helen's body (his sister) because of the yellow tape. Furthermore, PW11 had testified that he interviewed PW2 and PW3 at the crime scene, hence, the defence had no basis in saying that PW2 and PW3 were not at the crime scene.

[33] With regard the point that the area was cordoned by the police when PW11 arrived at the crime scene, this is in direct contradiction with the evidence of PW11 himself who as we have seen was the investigating officer. He had pointedly answered in reply to the question what he saw when he first arrived at the crime scene that he 'saw a lady lying down on the road covered with blood'. He then went on to describe the injuries that he saw on the body of the lady and his observation that there was no one with her or nearby her at that point in time. He did not speak of the crime scene having been already cordoned by the police. In fact none of the police witnesses had testified that other police personnel had gone to the crime scene before the arrival of PW11 and his team of CID detectives, the photographer and K-9 Unit. PW11 also testified that after seeing the injuries on the lady, his first action after arrival at

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the scene was to instruct his men 'to guard the crime scene'. Obviously, no other police personnel had arrived at the scene for PW11 to instruct his men to start guarding the scene.

[34] As regards the evidence of PW5, with respect, I disagreed that he said he was at the crime scene at about 11am. In his evidence he said that he was still at his friend's rented house at Jalan Belian Sibu at about 11am. From there he went to the *bazaar* and on the way came upon a crowd that had gathered at the crime scene where he found his sister. I reproduce the relevant part of his examination-in-chief to illustrate the point:

Examination-in-chief of PW5

> Q 377: On 9.8.2009 at about 11:00 a.m., where were you?
>
> A: At my friend's rented house.
>
> Q 378: Where?
>
> A: Jalan Belian Sibu.
>
> Q 379: On the same date and at the same time, what happened?
>
> A: I went to bazaar and on the way I saw a crowd at the scene. I came closer and saw my sister's body. I cannot come closer to my sister's body because there was a yellow tape. I just waited there.

[35] In my view, since PW5 was still at his friend's house at Jalan Belian at about 11am and then went to the *bazaar* coming across the crowd that had gathered at the crime scene, it could not be that by the time he arrived at the crime scene, it was still about 11am. Furthermore, PW5 spoke of seeing a crowd at the scene and of having waited at the scene because of the yellow tape. If PW5 had arrived at the scene before PW11's arrival, it did not make sense that PW11 did not see the crowd that had gathered and did not see the yellow tape seen by PW5. As for saying that the defence has no basis in saying PW2 and PW3 were not at the crime scene, I believed this is misconceived. The defence case was not that PW2 and PW3 were never at the crime scene, rather, the case for the defence was that PW2, PW3 together with Holo had gone to the crime scene upon hearing the commotion at the scene and after the police had arrived. These were matters put to PW2 and PW3 under cross-examination. To my mind, the case for the defence tied with the evidence of PW11 who had clearly stated that he did not find anyone together with the deceased or nearby her body upon arrival at the scene and had only found PW2 and PW3 at the crime scene after he had conducted initial investigations like doing the markings, taking of photographs, drawing the sketch plan and instructing his men to send Helen's body to the hospital. Since PW11 did not find PW2 and PW3 at the scene upon arrival but found them after the investigations were done and the body sent to hospital, it must have been that PW2 and PW3 had arrived at the scene after PW11 and his men as the defence

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had claimed. The evidence of PW11 being so, the evidence of PW3 of having seen the assailant running away from the body of Helen and turning his face towards him became the more dubious thus unreliable.

[36] Thirdly, it is significant that PW3 did not, at the first reasonable opportunity when he lodged his police report (P9), mention anything in his report about seeing the assailant fleeing from the scene or that he had recognised the assailant. There could be no denying that PW3's assertion in court that he had seen the accused running away from the deceased holding a *parang* that was covered with blood and then turning his face toward him thus enabling him to recognise the accused are material and salient facts. This would have been the most important piece of information within the knowledge of PW3 (if indeed he had witnessed what he had described in court) and one which he was reasonably expected to disclose to the police when he lodged his report. It was strange that he did not state a word of this important information in P9. In P9, PW3 had narrated in detail some of the happenings on the day in question ranging from the minor such as washing clothes in the room to the important detail of the visit of the unknown man with a *parang*, the shout for help, looking out the bathroom window and seeing a body sprawled on the ground, going to have a look at the body and discovering it was Helen, and calling the police for help. However, when it came to this all important part when he reached the body of Helen he stated as follows: 'Saya terus pergi ke tempat tubuh tersebut untuk menyiasat apa yang berlaku dan mendapati bahawa tubuh tersebut adalah perempuan yang bernama Jalut yang dicari oleh lelaki berkenaan. Kemudian seorang perempuan yang berada disitu menghubungi polis 'As I said, not a word about having seen the assailant running away from the body towards the motorcycle whilst carrying a bloodied *parang* or seeing him turn his face towards him. The assertions surfaced for the first time when PW3 gave evidence in court. I was convinced that PW3's new assertions in court were an afterthought put together when the other so-called eyewitness (PW2) who testified earlier had failed to implicate the accused as a result of her poor identification evidence. Well, the inherent improbability of the new assertions and the fact that they were contradictory and irreconcilable with the evidence of PW2 had shown us for what they really were – a recent concoction and unworthy of belief.

[37] Fourthly, even if for the sake of argument, I had believed the evidence of PW3 that he had seen this person running away from Helen and turning his face towards him, I still would say that the circumstances in which the identification by PW3 of the accused came to be made was very poor. PW3 said that he was not sure whether the assailant that he allegedly saw was wearing a helmet or a cap as the distance between them was far. Earlier we heard from PW2 who had categorically stated that the assailant was wearing a helmet. To my mind, if PW3 could not make out whether the assailant was wearing a

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helmet or a cap, the distance between them must have been far indeed – in all probability 65 feet or 2 meters which is the distance PW3 himself gave between Helen's body and the place where the motorcycle of the assailant was allegedly parked. In my view, it could not have been merely 24 feet as PW3 first claimed. Further, it must be kept in mind that according to PW3 the assailant was running, turned his head back and went to his motorcycle and rode off. The irresistible inference is that when the assailant allegedly turned his head it must have been quick and brief. It followed that PW3 would have been afforded a mere fleeting glance of the face of the assailant. In my judgment, if PW3 could not make out in the distance whether it was a helmet or a cap that the assailant had on, it was inherently improbable that he was able to recognise the face of the assailant at that distance from one fleeting glance. As stated in *R v Turnbull*, even where a witness purports to recognise someone whom he knows, the court should be reminded that mistakes in recognition of close relatives and friends are sometimes made. In my judgment, in such circumstances, the quality of the identification evidence of PW3 was in any event poor and unreliable.

[38] That was not the end of the fallibility and weaknesses in the evidence of PW3. Earlier on I have referred to his statement in P9 that the man that came to Room 401 was a person unknown to him. He claimed in court that this part of his police report was inaccurate and that he had given the inaccurate information because he was nervous and scared when he lodged the report. This admission by PW3 that he gave a false statement in his police report was to his discredit regardless of the reasons given for making it. To confound matters, PW11 claimed to have asked PW3 whilst recording his witness statement why he had stated in line 3 of P9 that 'seorang lelaki yang saya tidak kenali'. PW3 had allegedly answered that he was very scared and nervous at the time he lodged the police report. PW11 claimed that this particular question and answer was recorded in the witness statement of PW3. Whereupon, defence counsel requested PW11 to highlight in the statement that particular question and answer to be shown to the court. That was done but when I perused the highlighted part of the witness statement I did not find any such question and answer in the witness statement. Hence, PW1 was not being truthful when he testified that it was recorded in the witness statement that he did ask PW3 and the latter had told him he was scared and nervous. In my judgment, the extent to which PW3 and PW11 would go to deny the accuracy of the fact stated in P9 that PW3 did not know the person that came with a *parang* on 9 August 2009 was to their discredit. It added up as one of the justifications for me to treat their evidence, especially that of PW3, with circumspection.

[39] The final point is this. Under cross-examination PW3 agreed that he took the stand that since the accused was arrested by the police, he thought that the accused must be the murderer. The cross-examination is as follows:

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> Q 345: I put it to you that you took the stand that since the accused was arrested by the police you think that he must be the murderer?
>
> A : I agree.

When the learned deputy sought clarification from PW3 this is what transpired during re-examination:

> Q 347: You agreed with counsel when he said that you took the stand that since the accused was arrested by the police you think that he must be the murderer. Can you explain?
>
> A : Because I saw him went upstairs looking for Helen and he spoke in rough manner. That's why I say so.

[40] As can be seen from the re-examination, instead of clarifying matters, PW3 came up with another own assumption that the accused must be the murderer since he came to look for Helen and spoke in a rough manner. It is significant that PW3 when given the chance to explain why he thought that the accused was the murderer referred to the point in time when the accused visited Room 401 looking for Helen instead of referring to his previous evidence that he had recognised the accused when he turned his head as he fled from the scene. This was yet another demonstration of PW3 not being able to maintain a consistent story line and making assumptions that are downright prejudicial. He assumed that the accused was carrying a *parang*, he assumed that the accused must be the murderer since he was arrested by the police and the last was that he assumed that the accused must be the murderer because he came to look for Helen and spoke in a rough manner. A court of law cannot act on wild guesses – far be it.

Conclusion on the identification evidence

[41] For the reasons stated above, I found and held that the quality of the identifying evidence of PW2 and PW3 was poor. As laid down in *R v Turnbull*, if the court comes to such a finding, an order of acquittal should be made unless there was other evidence capable of supporting the identification evidence. Karthigesu JA puts it this way in *Heng Aik Ren Thomas v Public Prosecutor* [1988] 3 SLR 465 (followed in *Tarn Kim Hoo v Public Prosecutor & Anor appeal* [2007] 6 CLJ 557 at p 566):

> Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there any other evidence, which goes to support the correctness of the identification? If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification would be unsafe.

[42] In our present case, there was no such credible supportive evidence available, none at all. The murder weapon was never recovered; none of the

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forensics exhibits collected for analysis yielded anything of significance and as explained earlier, the ID parade evidence was of no value. The identification evidence being poor and there being no other evidence capable of supporting the identification evidence, the prosecution had fallen short of proving that it was the accused that had caused the injuries sustained by the deceased or that they were inflicted in consequence of the act of the accused.

WHETHER THE ACCUSED HAD THE INTENTION TO KILL THE DECEASED

[43] This was the final element of the offence. I would say that from the nature of the injuries inflicted on Helen and the parts of the body that were targeted, whoever inflicted the injuries must be inferred to have the intention to kill the deceased. However, as set out above, the prosecution had failed to prove to the required standard that it was the accused that had inflicted those bodily injuries. It followed that the prosecution also failed in proving this final element of the offence.

CONCLUSION

[44] Given the poor quality of the identification evidence and there being no other evidence to support it, I really was not prepared to convict the accused if he had remained silent in the event he was called to enter his defence. For that reason I found and ruled that the prosecution had not made out a prima facie case against the accused. Accordingly, I ordered that he be discharged and acquitted of the offence charged without his defence being called.

Accused discharged and acquitted without calling to enter defence.

Reported by Afiq Mohamad Noor